Supreme Court, U.S.
FILED
NOV 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI WITH REQUEST FOR HEARING AND MEMORANDUM OF AUTHORITIES

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November 6, 1980

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The Petitioner, Eugene Johnson III opposes the Respondent's Motion to Dismiss the Writ of Certiorari on grounds and for reasons which hereafter appear in this

Opposition, its Affidavit and his Memorandum of Points and Authorities; and he requests hearing hereon if necessary.

1. This Motion is not consented to. It is a unilateral attempt to seek further rulings below that Respondent evidently believes may moot the cause. That relief could not moot the cause for a number of reasons. A case and controversy in which this Petitioner has a direct stake clearly continues if for no other reason than the statute at issue remains in force and effect and continues to apply to this Petitioner father whatever the lower Court may do. However, even before addressing that self-evident fact, there are substantial record and motion omissions that exist. Respondent was aware at the time of the filing of the Motion that it would not be consented to.

He has failed to state either the full record or recent facts, showing a pattern of like behavior that does not appear to show good faith in this effort. That, in itself, warrants forthwith denial of the Motion, without regard to a detailed analysis of the standards applicable to a Motion of this kind, especially one made at this time and under these circumstances. He has failed to support his Motion with legal authorities so that this Petitioner father might address the theory and cases on which he relies to satisfy the heavy burden that the law places upon him to sustain this Motion. A good faith Motion, not filed for delay or diversion, should have supplied those defects, including some evidence of good faith. Their absence has unnecessarily lengthened this Opposition and its Memorandum.

2. The Motion seeks to have the cause returned to the District of Columbia Court of Appeals and thereafter to the Superior Court because, in effect, the Respondent is suggesting that he now is agreeable to a vacating of the order for adoption. The Motion omits to mention the facts and inferences of lack of good faith that exist in his stated positions under oath or in filed briefs even in this Court. They include more than three years of legal action blocking the proper exercise of Petitioner's constitutional rights; they include irreparable loss of clear rights to have a relationship with his children and their consequences to Mr. Johnson during the pendency of this cause; they include the repeated filed oppositions of the mother and stepfather over the past three years of litigation to any change or relief to Mr. Johnson,

even to the stepfather's Brief in Opposition to Mr. Johnson's Petition for Writ of Certiorari. These attempts are merely what he has said and done in filed Briefs and papers.

3. The Motion does not address other critical facts or pertinent law that show that this cause is not moot. First, it is clearly, at best, a unilateral and "voluntary" attempt in another guise to agree that he will cease his wrongful actions if the lower Court involved agrees to vacate the order. At best, even if its good faith were not in issue, it does not satisfy or meet the applicable principles cited in United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968), which deal with unilateral attempts to moot causes in circumstances analogous to this where a party

agrees voluntarily to cease his improper conduct in bringing the action or taking the steps at issue. Furthermore, even if the order were vacated, it does not meet the objection that the same actions taken in the past years can be taken again under the unmodified statute that is being challenged; or in short, it does not meet the required standard that the proposed action not permit the case to be "capable of repetition" --- the standard noted in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). These principles are fully set forth in the Memorandum that follows.

4. With regard to the failure of the Motion to perform even the minimal requirement of setting forth both the full facts or any pertinent case authority to support it, the following should be observed: this case is not merely or even primarily merely about the vacating of a decree, even if the various Courts involved would agree to do it. It is about what led them to that result. As the Questions Presented in our Petition for the Writ reflect, it is about a "best interests" adoption statute; about standards applied to a divorced parent; about notice of prohibited conduct; about application of Court standards already determined even before this decision that gave the basis for the Order. It is about more. None of this would change in its application to Mr. Johnson, even if somehow the District of

Columbia Court of Appeals withdraws its Opinion, the lower withdraws its Opinion, the lower withdraws its objected-to findings, both underlying and ultimate, and the decree is somehow set aside, sometime.

5. The Motion rests on an inadequate statement of the issue and inaccurate statement of the record. Other portions of the record not heretofore noted further reflect the lack of good faith on the Respondent stepfather; and the probability of repetition by him and the mother. For example, the Motion begins by reciting that the case commenced on March 31, 1977 when a Petition for Adoption was filed. It neglects to state what the record in the trial and in proceedings below would show if this Motion had stated and encompassed the pertinent record (and, indeed, what is reflected in part in the Court's findings): that Mr. Johnson was

assured at the time of his original divorce in 1968 that he would not be deprived of meaningful and effective rights and visitation with his children; that he had to go to Court, in expensive and difficult proceedings on two occasions, to obtain Court Orders that he was otherwise entitled to without any question; that the natural mother and stepfather in this cause repeatedly insisted he should have no visitation rights after his first hospitalization; that they took steps, including the use of their substantial wealth, and the natural delaying process in the Courts, to inhibit the exercise of those rights while time was steadily passing, and that they intentionally alienated the children and inculcated them against the Petitioner who is their natural father. The record is replete with acts which do not reflect either truth or candor on the part of the natural mother or

the stepfather in dealing with this subject or their intentions. It reflects that before the Petition was filed, they attempted to obtain the consent of the natural father to the adoption even to bargaining off alleged support against it; and directly or indirectly made clear that if he resisted or if he reasserted visitation rights, he would be opposed at all stages, his personal life unrelated to that in the presence of or affecting the children, would be exposed, his hospitalizations and his relationships with women fully brought out and the like. In fact that did occur in the case. The stepfather and mother have persistently done anything and everything, including the effective use of their great wealth in these proceedings by causing multiple depositions, delays and disputes that lack genuine merit, merely to prohibit the exercise of the rights that this Petitioner father asserted. Their very Motion at this time after all these years is no more

than a reflection of that fact; and a carrying out now, in another guise, of what was done in the past.

6. The vacating of the Order, even if somehow effected, will not do away with the statute which affords these parties the further opportunity in the ensuing years to carry out in the same way these same actions. Even assuming that they would be able to obtain the elimination of the Court ruling in the D.C. Court of Appeals (which is not clear); and even assuming, for the sake of discussion, they could have the lower court vacate an Order which it entered based on specific findings then that dealt with best interests of the children (another matter that is not free from doubt); and even assuming the collateral and future effect of the findings in the lower Court were possible to remove (another matter in doubt); and even

assuming that the financial consequences of the decision including the fees unnecessarily and improperly incurred and support matters were resolved (issues not addressed and unlikely of resolution);* and even assuming all these doubtful matters were resolved promptly, this Petitioner father remains subject to the Respondent's use or threat to use a statute which is unconstitutional. That fact alone, without regard to any other, is one which will continually chill or stop his further relationship with his children for fear that he might be passing beyond the "best interests" test he deems constitutionally impermissible and improper, and is the subject of his appeal to this Court; or

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* The father asserts that the collateral effect of these findings in future actions is clear; that the "voidness" of the decree is important to financial aspects of the case including future claims and that he <u>will</u> be chilled.

it could lead to or cause another adoption to take place, perhaps on alleged "changed facts." That fear is real and supported by a reasonable likelihood of repetition if he meaningfully exercises his rights which he will do; a likelihood that would not receive an effective review. In this regard, without addressing other issues of "mootness," but simply to test the question of good faith, this Petitioner father requested of Respondent that he do two things before there would be further discussion about the nature of what would occur in the event the Order were vacated. He made clear that this was not a matter of settlement discussions for they would not even be entertained until minimal admissions were given. He therefore first insisted that Respondent provide him with an unconditional confession of error in bringing the action and pursuing it; and of equal importance to the issue of good faith, that the

stepfather agree, now and unconditionally, that in the event this Court for some reason rules contrary to the position of this Petitioner father on the merits, that nonetheless these Respondents would state now that they will still agree to have the Order vacated. That request is at least one test of the first requirement --- current good faith --- before any further meaningful discussions could be had. That demand was not agreed to. That refusal plainly underscores the claim of lack of good faith in the Motion and the stepfather's intentions.

7. Other issues and matters affect the Motion. The Order below did not address the relief that Mr. Johnson was requesting. It did not do so because it found the statute constitutional and, on the basis of the statute, granted the relief to the stepfather. Mr. Johnson's Answer and other pleadings show that he was seeking relief that goes beyond merely an Order that the Court declare the

unconstitutionality of the statute or its application. It sought as "appropriate relief" visitation rights in the light of improperly lost visitation.*

8. Mr. Johnson has lost four years with his children. Each day that goes by is a lost day, a right that he cannot effectively exercise or depend on in the future until this Court rules. Respondent

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*The Petition for Adoption did not even refer to his previous visitation orders that he obtained with considerable difficulty and expense in 1971 and 1972. It is of no small moment to the point made by him that the stepfather has not acted with candor or truth or full disclosure when it is recalled, as the record will show, that nowhere in the Petition for Adoption is there a reference to any Court Orders which he incorporated in his Answer and wanted the Court to enforce. The witness lists show 16 people whose depositions were taken on every subject imaginable in his life, causing him great cost and expense and dealing with matters that did not bear on the subject at all. There is an ample pattern to support his assertion that that will occur again.

stepfather with the mother has delayed and caused this natural father to lose critical time in his relationship with his children. A loss of a day or a week may not reach constitutional proportions; but four years lost in his relationship with these children is a very substantial loss that remains irreparable unless the strongest kind of remedies are provided. The omitted record clearly shows that once that attempt is made to effect those remedies, Mr. Johnson will be in Court again faced with the same statute, precedents and findings that are awaiting ruling here.

This Court granted the Petition to hear those matters. Nothing in the Motion supports a basis not to do so.

Wherefore Petitioner prays that the Motion be denied.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
OPPOSITION TO
MOTION TO DISMISS

While it is not mandatory that a Memorandum or Brief be filed in support of a Motion of this kind, the absence of any authority places this Petitioner at a decided disadvantage because it is unclear on what theory,

facts or precedent Respondent relies.

Simply to state that there is no case or controversy because of an alleged unilateral willingness to vacate the Order is not sufficient, as even a cursory reading of some of the authorities would indicate. See Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911) (actions capable of repetition); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969) (election held, statute unaffected); Carroll v. Princess Anne County, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350 (1968) (actions could reoccur); Walling v. Helmerick & Payne, 323 U.S. 37, 43, 65 S.Ct. 11, 14 (1944) (unilateral discontinuance of acts complained of).

Without regard to the inadequate record to support Respondent, and even putting to the side the pattern showing lack of good faith or the matter of collateral consequences,

Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 713 (1973) seems a fairly clear obstacle to any mootness claim here. The same potential repetition there (a future pregnancy) that provokes application of the challenged law, is here in the exercise of Mr. Johnson's rights.

It might be noted that even in DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704 (1974), the majority and dissenting opinions appear to recognize (in circumstances where there was far less time "remaining" involved than is here present, and where there was no continuing application of an alleged unconstitutional statute) there were, at best, special circumstances only which permitted that matter to be deemed moot by the majority. It was the fact that Mr. DeFunis could not have had the admissions policy applied to him in the future, stated the majority, that was critical. The

majority view of the setting in DeFunis emphasized that the state officials involved had represented that "without regard to the ultimate resolution of the issues" that Mr. DeFunis would remain a student and graduate shortly because he was then in his final term. This meant, said the majority, he was "irrevocably admitted to the final term of the final year of the Law School course." (416 U.S. at 317) Since the relief he sought was an injunction "commanding his admission" (416 U.S. at 317); and since "the settled and unchanged policy" of the school permitted full exercise of all rights (416 U.S. at 320); and since "DeFunis will never again be required to run the gauntlet of the Law School's admission process" (416 U.S. at 319), the majority felt in that special case that the question "...is not 'capable of repetition' so far as he is concerned." (416 U.S. at 219) The dissents

of Justices Brennan, Douglas, White and Marshall emphasized that weeks remained to DeFunis and a number of "unexpected events" could occur that might delay his completion of the term. They underscored, 416 U.S. at 349, that:

> "...because the University's position implies no concession that its admissions policy is unlawful, this controversy falls squarely within the Court's long line of decisions holding that the '[m]ere voluntary cessation of allegedly illegal conduct does not moot a case.' United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968) (remaining citations omitted)....Since respondents' voluntary representation to this Court is only that they will permit petitioner to complete this term's studies, respondents have not borne the 'heavy burden,' United States v. Concentrated Phosphate Export Assn., supra, 393 U.S., at 203, 89 S.Ct., at 364, of demonstrating that there was not even a 'mere possibility' that petitioner would once again be subject to the challenged admissions policy. United States v. W. T. Grant Co., supra, 345 U.S., at 633, 73 S.Ct., at 898. On the contrary, respondents have positioned themselves so as to be 'free to return to [their] old ways.' Id., at 632, 73 S.Ct., at 897."

Using both the theory of the majority in DeFunis, and certainly the basis and grounds of the dissenting judges in the same case, the effect of that decision, applied to this case, plainly indicates its non-mootness.

Our statute remains in force, as we have said. This is an individual, and not a state official, who refuses to confess error. There is a strong pattern of past behavior showing lack of good faith. Mr. Johnson, unlike Mr. DeFunis, has not even been able to maintain and keep his relationship with his children and has lost irreparable time during the pendency of the actions. There are collateral consequences to the appeal and lower court findings, both financial and those applicable to the future exercise of rights which he intends to exercise to their fullest. DeFunis was attending school during the appeals -- i.e., receiving the benefit of the

relationship, whereas that is not the case at bar. The time factor here is far more extensive. At the time of the filing of the Petition, one of the children was about 12-1/2 and the other had just reached 11. Even after the three years that Mr. Johnson has been deprived of that relation --- unconstitutionally, and while they have grown --- they are still well below the age of 21 for support in the District of Columbia, or the statutory age of 18 referred to in the District of Columbia adoption statute.

In our cause, the statute continues, available for use; it chills; the relationship has been stopped; the collateral consequences are plain; even the vacating of the Order and its effect is uncertain.

This cause is expected to be heard in the near future in tandem with Doe v. Delaware, prob.juris. noted, March 24, 1980, 48 U.S.L.W.

3613, #79-5932. It deserves early resolution.

To sum up: Respondent did not present a full and fair record to the Court in his Motion. Even now, he would not unconditionally do that which is minimally required for good faith --- agree to a vacating whatever the result.

One observes in the decided cases that most frequently mootness arises from the mere passage of time or the fact that the challenged action no longer applies because the individual bringing the suit now has his residence, obtained the divorce, reached the proper age, passed through the procedure, or the like; and where, at best, depending on the views of the record, repetition is not really possible. This is a situation where unilaterally a private party is seeking to create mootness; and it is a party whose pattern of conduct does not reflect good faith.

Perhaps there was no pertinent authority supplied to support the Motion because, as we suggest, none exists.

The Motion deserves a swift denial.

Respectfully submitted,

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AFFIDAVIT OF PETITIONER EUGENE JOHNSON III
IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

Eugene Johnson III, being first duly sworn, deposes and says as follows:

1. That he has read the facts set forth in his Opposition and Memorandum.

2. That the facts stated therein with regard to matters in the record in this cause, the understandings of the parties prior to divorce and thereafter, the pattern of bad faith in the actions and purposes of the natural mother and stepfather, and the other facts set forth in the Opposition and Memorandum are true according to the best of his knowledge.

3. That the allegations of fact relating to his future intentions, the exercise of his rights, and the remaining allegations of fact therein asserted are likewise true.

Eugene Johnson III

Eugene Johnson III

Subscribed and sworn to before me the undersigned Notary Public, this 6th day of October, 1980.

Edward F. Gerber

Notary Public, D.C.